NORMA J. BROWN

IBLA 88-429 Decided September 25, 1990

Appeal from a decision of the Boise, Idaho, District Office, Bureau of Land Management, rejecting desert land entry application I-5508.

Set aside and remanded.

1. Desert Land Entry: Applications

> Where a desert land entry applicant receives notice from BLM that based on a computer projection the proposed operation has been determined to be economically unfeasible and the applicant fails to respond to an invitation to provide further support for the operation, BLM may properly reject the application. However, where the applicant alleges facts for the first time on appeal which should be considered by BLM in its analysis of the plan, the Board may set aside BLM's decision and remand the case for consideration thereof.

APPEARANCES: Norma J. Brown, Mountain Home, Idaho, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Norma J. Brown appeals from a decision of the Boise, Idaho, District Office, Bureau of Land Management (BLM), dated April 14, 1988, rejecting her desert land entry application, I-5508. The rejection was based on a determination, in accordance with 43 CFR 2520.0-8(d)(3), that it would be impractical to farm the lands sought as an economically feasible operating unit. 1/

1/ 43 CFR 2520.0-8(d)(3) provides as follows:

"In determining whether an entry can be allowed in the form sought, the authorized officer of the Bureau of Land Management will take into consideration such factors as the topography of the applied for and adjoining lands, the availability of public lands near the lands sought, the private lands farmed by the applicant, the farming systems and practices common to the locality and the character of the lands sought, and the practicability of farming the lands as an economically feasible operating unit."

Brown filed application I-5508 on July 10, 1972, for 323.55 acres of public land situated in S½ SW¼ sec. 17, and lot 2, SE¼ NW¼ , and SE¼ sec. 18, T. 4 S., R. 6 E., Boise Meridian, Elmore County, Idaho. 2/ In her application, Brown proposed to cultivate sugar beets on 160 of the 280 irrigable acres, using water pumped from an underground well "located at NE corner SE¼ SW¼ Sec 17" (Application at Exh. 2). Of the remaining acreage, she proposed to devote 40 acres to the cultivation of grain, and 80 acres to alfalfa. For years 1973, 1974, and 1975, Brown projected an average net annual income of $20,620, based on the value of the crops produced less the expenses of production. Id. at Exh. 4.

Other than two letters to Brown in 1976 from BLM regarding the status of her application, there is no correspondence in the case file until March 7, 1988, when BLM informed Brown that, based upon its farm budget computer model, it determined annual operating costs of $221,268 and total revenue of $198,763, resulting in an annual net loss of $22,505 for her operation. BLM offered Brown the opportunity within 30 days of receipt of the notice to contact it to arrange the presentation of any new information in support of her application. Brown did not respond to the notice, and on April 14, 1988, BLM issued its decision rejecting her application.

Brown filed a timely appeal, stating:

> We have been farming the adjacent property for over 17 years and we have developed water resources that are available at the cost of laying mainline from the points of diversion to the property. All wells and mainline are depreciated out and state law allows for the changing of diversion point of the water permit application (42-205, 42-206) of the state water code.
>
> We have been filed on this property for almost 16 years and [it] was considered feasible until 3 years ago. Even using your figures.
>
> It is our belief that it is still feasible today. * * * The costs outlined in your report are completely unreasonable as determined by our experience in the area.

2/ It is unclear from the present record whether the land embraced by Brown's application has been classified as suitable for desert land entry. Plat maps of T. 4. S., R. 6 E., Boise Meridian, dated July 1972 appear to indicate that the lands embraced by the application were classified as suitable for desert land entry prior to the filing of appellant's application. However, a May 13, 1976, letter to appellant's husband from the Boise District Manager stated that the District was working on a plan for classification of land as suitable or unsuitable for agricultural development and that "your wife's desert land application (I-5508) is tentatively scheduled to be worked in Fiscal Year 1977 * * *."

With her appeal, appellant has submitted an estimation of alfalfa and grain wheat yields less costs on a per-acre basis. She alleges that her cost estimates are lower than those projected by BLM "due to owning an[d] operating all equipment." With respect to start-up costs, she states that the mainline necessary to irrigate the property is available to her at a cost of $10,000, substantially less than the amount set forth in BLM's computerized report, and that she already has handlines to irrigate the property.

[1] Section 1 of the Act of March 3, 1977, as amended, 43 U.S.C. §321 (1982), provides for the patenting of tracts of desert land not exceeding 320 acres to persons who make satisfactory proof of reclamation of the land and pay the required purchase price. The statute specifically provides that entered tracts of land shall be "managed satisfactorily as an economic unit." 43 U.S.C. § 321 (1982). Accordingly, the applicable regulation, 43 CFR 2520.0-8(d)(3), states that in determining whether to allow a desert land entry, the authorized BLM officer will take into account various factors, including the "practicability of farming the lands as an economically feasible operating unit." The question of economic feasibility, according to the BLM Manual at 2520.0-6(A)(4) (Oct. 21, 1974), is whether the land

> can be developed into a profitable operation on a "permanent" basis. The value of the increased production of a given tract of land must be sufficient to provide a profit after all costs have been deducted. This profit must be large enough to ensure the expectation of continued cultivation. * * * The concern is with the stability of the farming operation.

Therefore, where the evidence establishes that lands sought in a desert land entry application could not be farmed as an "economically feasible operating unit," we have affirmed BLM's rejection of the application. Sally Ann Lana Henderson, 107 IBLA 193, 195 (1989). However, where BLM has failed to consider specific economic factors relevant to the individual circumstances of desert land entry applicants, this Board has set aside and remanded BLM decisions rejecting desert land entry applications or set the decision aside and referred the case for a hearing. See G.V. (Pete) Cope, 109 IBLA 226 (1989); Leroy R. Davis, 107 IBLA 204 (1989); Frederick C. Tullis, 102 IBLA 215 (1988); David V. Udy, 81 IBLA 58 (1984). In each of these cases, although BLM was apprised of facts specific to the applicant's circumstances, it did not precisely consider them in its decision to reject the application, which was based solely upon BLM's internal computerized standard economic model.

On appeal, Brown has alleged circumstances similar to those raised by the aforementioned applicants. Appellant challenges BLM's assessment of costs based upon the purchase of new equipment, and alleges that she has equipment available, and that using it makes her proposed operation economically feasible. In Tullis and Cope the appellants both alleged that they

owned some of the equipment necessary for their operations. In Tullis, BLM filed a petition for reconsideration of our decision, arguing that certain ownership costs are an appropriate cost of doing business, even where an applicant owns the necessary equipment.

In our order denying reconsideration, we addressed that argument, as follows:

> We did not intend to preclude the inclusion by BLM of costs for depreciation, insurance, taxes, and interest in its economic modeling. As BLM explained through the affidavit of Stanley C. Frazier, a BLM agricultural economist in Idaho, BLM spreads those costs out over the life of the equipment on the basis of the expected life of the equipment. In addition, BLM properly includes labor costs and also lost opportunity costs. The real question is what are the appropriate ownership costs in this case and one of the purposes of referring these cases for a hearing was to allow appellants to present evidence regarding equipment and well drilling costs. [Emphasis in original.]

Order in Frederick C. Tullis (On Reconsideration), IBLA 86-643 (Oct. 3, 1988).

Brown alleges that BLM has not considered an adjacent operational unit farmed by her and her husband. In David Udy, supra, we set aside a decision where yields from nearby private lands farmed by the applicant were not considered by BLM in its economic viability analysis. See also Harriett B. Ravenscroft, 105 IBLA 324 (1988). In Leroy R. Davis, supra, we set aside the rejection of a desert land entry application, stating that nothing in the record indicated that BLM had taken into consideration the applicant's assertion that the applied-for lands were to be developed in conjunction with adjacent private lands. It appears that appellant may be alleging a similar circumstance.

The question in this case is whether the allegations made by appellant on appeal justify a remand. In its notice, BLM provided appellant with the opportunity to come forward with information in support of her application. She failed to do so. Therefore, it was proper for BLM to have rejected her application.

Generally, where an applicant receives notice from BLM that a specific act must be performed within an allotted time period in order for the applicant to maintain or pursue activities or rights granted by law, where the applicant fails to respond to BLM's directive within the time set forth in BLM's notice or in the regulation, the applicant loses the opportunity to further participate in the application process. Thus, this Board has held that BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer when special stipulations are not executed and filed within the time limit specified. William H. Kerlin, Jr., 95 IBLA

377 (1987); Arthur Ancowitz, 53 IBLA 69 (1981). Further, outdoor recreationists who do not file applications for special use permits in conformance with BLM deadlines may properly be denied permits. Ken Warren Outdoors, Inc., 85 IBLA 354 (1985); Outdoor Adventure River Specialists, Inc., 41 IBLA 132, 133 (1979). Where a deadline is imposed by BLM for compelling administrative reasons, a filing after the deadline is properly rejected. Ken Warren Outdoors, Inc., supra.

These situations, however, are defined by limiting factors delineated by law or regulation, by intervening third party rights, or by compelling administrative constraints, 3/ none of which are involved in this case. Brown filed her application for desert land entry with BLM in 1972. After virtually no communication from BLM for almost 16 years, BLM informed appellant that her proposed operation had been found to be economically unfeasible and that she had 30 days from receipt of the notice in which to contact BLM regarding the submission of new information. While we are cognizant of BLM's need to finalize applications pertaining to the use of public lands, appellant has now filed information, which, if proved, could result in a different conclusion. See Leroy R. Davis, supra at 208; David V. Udy, supra; Joanne F. Wright, 49 IBLA 237 (1980). Under the circumstances, we believe that the proper course of action is to set aside BLM's decision and remand this case to it to allow it to review the information submitted by appellant on appeal. In addition, BLM should provide appellant with an additional opportunity to submit any further data in support of her application. BLM should then analyze that material and issue a new decision. Should the decision be adverse, appellant will again have the right to appeal to this Board.

3/ The regulations at 43 CFR 1821.2-2(g) provide BLM with a certain amount of discretion concerning consideration of untimely filed documents:

"When the regulations of this chapter provide that a document must be filed or a payment made within a specified period of time, the filing of the document or the making of the payment after the expiration of that period will not prevent the authorized officer from considering the document as being timely filed or the payment as being timely made except where:

"(1) The law does not permit him to do so.

"(2) The rights of a third party have intervened.

"(3) The authorized officer determines that further consideration of the document or acceptance of the payment would unduly interfere with the orderly conduct of business."

In Bill Mathis, 90 IBLA 353 (1986), where appellants had filed oil and gas lease stipulations after the 30-day deadline imposed by BLM, we set aside BLM's decision rejecting the lease offer and remanded the case for a determination of the applicability of 43 CFR 1821.2-2(g), stating that, "[i]nasmuch as Departmental policy allows the waiver of filing deadlines set by regulation under certain circumstances, it would be incongruous to hold
that such policy should not apply with equal force to deadlines set by correspondence." Id. at 355 n.2.

Accordingly pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge